



HIGH COURT BULLETIN

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High Court of Australia Library
[2011] HCAB 06 (19 August 2011)

A record of recent High Court of Australia cases: decided, reserved for judgment, awaiting hearing in the Court's original jurisdiction, granted special leave to appeal, refused special leave to appeal and not proceeding or vacated.

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SUMMARY OF NEW ENTRIES

[1: Cases Handed Down](#)

Case	Title
<i>Haskins v The Commonwealth</i>	Constitutional Law
<i>Nicholas v The Commonwealth</i>	Constitutional Law
<i>Green v The Queen; Quinn v The Queen</i> *	Criminal Law
<i>Cush v Dillon; Boland v Dillon</i>	Defamation
<i>Byrnes v Kendle</i>	Equity
<i>Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd</i>	Local Government

* Appeals allowed. Order of the New South Wales Court of Criminal Appeal set aside and in its place order that the appeal to that Court be dismissed. The High Court will publish its reasons at a later date.

2: Cases Reserved

Case	Title
<i>Williams v The Commonwealth & Ors</i>	Constitutional Law
<i>Wotton v State of Queensland & Anor</i>	Constitutional Law
<i>Moti v The Queen</i>	Criminal Law
<i>Strong v Woolworths Limited t/as Big W & Anor</i>	Torts

3: Original Jurisdiction

Case	Title
<i>Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor; Plaintiff M106/2011 by his Litigation Guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor</i>	Administrative Law
<i>Shahi v Minister for Immigration and Citizenship</i>	Administrative Law

4: Special Leave Granted

Case	Title
<i>ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue</i>	Contracts
<i>Perini v The Queen & Anor</i> [†]	Criminal Law
<i>Roadshow Films Pty Ltd & Ors v iiNet Limited</i>	Intellectual Property
<i>Federal Commissioner of Taxation v Bargwanna</i>	Taxation and Duties

[†] Appeal treated as heard instanter and allowed. Decision of Queensland Court of Appeal set aside and matter remitted to Court of Appeal.

1: CASES HANDED DOWN

The following cases were handed down by the High Court of Australia during the August 2011 sittings.

Constitutional Law

Haskins v The Commonwealth

S8/2011: [\[2011\] HCA 28](#).

Judgment delivered: 10 August 2011.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law (Cth) — Judicial power of Commonwealth — Constitution, Ch III — Validity of laws — Plaintiff defence force member — Plaintiff convicted of disciplinary offences and sentenced to punishment including detention by Australian Military Court ("AMC") established under *Defence Force Discipline Act 1982* (Cth) ("Discipline Act") — Plaintiff subjected to punishment — High Court subsequently held invalid provisions of Discipline Act establishing AMC — *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) ("Interim Measures Act"), Sched 1, item 5 applied where AMC had imposed punishment to declare rights and liabilities of all persons to be same as if punishment properly imposed by general court-martial, subject to review under Sched 1, Pt 7 — Whether provisions of Interim Measures Act constituted usurpation of judicial power — Whether provisions had prohibited features of bill of pains and penalties.

Constitutional law (Cth) — Powers of Commonwealth Parliament — Acquisition of property on just terms — Whether acquisition by Commonwealth of plaintiff's cause of action for false imprisonment.

Torts — False imprisonment — Liability of Commonwealth for acts of members of defence force — Detention of plaintiff a disciplinary measure applied by one member of defence force to another — Detention in obedience to command of superior — Command of superior lawful on its face — Whether action for false imprisonment destructive of military discipline — Whether action for false imprisonment available to plaintiff.

Words and phrases — "bill of pains and penalties", "false imprisonment", "military discipline", "usurpation of judicial power".

This matter was filed in the original jurisdiction of the High Court.

Nicholas v The Commonwealth & Anor

S183/2010: [\[2011\] HCA 29](#).

Judgment delivered: 10 August 2011.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law (Cth) — Judicial power of Commonwealth — Constitution, Ch III — Validity of laws — Plaintiff defence force member — Plaintiff convicted of disciplinary offences and sentenced to punishment by Australian Military Court ("AMC") established under *Defence Force Discipline Act 1982* (Cth) ("Discipline Act") — Plaintiff subjected to punishment — High Court subsequently held invalid provisions of Discipline Act establishing AMC — *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) ("Interim Measures Act"), Sched 1, item 5 applied where AMC had imposed punishment to declare rights and liabilities of all persons to be same as if punishment properly imposed by general court-martial, subject to review under Sched 1, Pt 7 — Whether provisions of Interim Measures Act had prohibited features of bill of pains and penalties — Whether provisions invalid as contrary to Ch III.

Words and phrases — "bill of pains and penalties", "usurpation of judicial power".

This matter was filed in the original jurisdiction of the High Court.

Criminal Law

Green v The Queen; Quinn v The Queen

S18/2010; S61/2010: [\[2011\] HCA Trans 197](#).

Judgment delivered: 3 August 2011 — *Reasons to be delivered at a later date*.

Coram: French CJ, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Criminal law — Sentencing — Appellants and other persons, relevantly Taylor, involved in cultivation of cannabis plants — Appellants pleaded guilty to offence of cultivating commercial quantity of cannabis plants and sentenced accordingly — Taylor pleaded guilty to offence of knowingly taking part in supply of commercial quantity of cannabis leaf and sentenced accordingly — Crown appealed against inadequacy of appellants' respective

sentences — No appeal instituted against Taylor's sentence — Court of Criminal Appeal ("CCA") increased appellants' sentences — Whether appropriate to allow Crown appeal against appellants' sentences thereby creating disparity between appellants' revised sentences and that imposed on co-offender not subject of Crown appeal — Whether CCA erred in finding, as essential step in its reasoning that appellants' sentences manifestly inadequate, that sentence imposed on Taylor also manifestly inadequate, in circumstances where such finding was not sought by the Crown and CCA did not give parties an opportunity to argue the point before making finding — *Drug Misuse and Trafficking Act 1985 (NSW)*, s23(2)(a) — *Criminal Appeal Act 1912 (NSW)*, s 5D — *Crimes (Sentencing Procedure) Act 1999 (NSW)*, Div 1A.

Appealed from NSW SC (CA): [2010] NSWCCA 313.

Defamation

Boland v Dillon; Cush v Dillon

S310/2010; S309/2010: [\[2011\] HCA 30](#).

Judgment delivered: 10 August 2011.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Defamation – Defence of qualified privilege – Where occasion of qualified privilege existed to communicate existence of rumour – Where defendant published rumour as "common knowledge" – Whether matter published on occasion attracting defence of qualified privilege – Whether distinction between publication of rumour and publication of fact of rumour.

Defamation – Defence of qualified privilege – Rebuttal by express malice – Where defendant did not believe truth of publication – Whether lack of belief in truth of publication sufficient to establish malice.

Words and phrases – "express malice", "qualified privilege".

Appealed from NSW SC (CA): [2010] NSWCA 165.

Equity

Byrnes & Anor v Kendle

A23/2010: [\[2010\] HCA 26](#).

Judgment delivered: 3 August 2011.

Coram: French CJ, Gummow, Hayne, Heydon and Crennan JJ.

Catchwords:

Equity — Trusts and trustees — Express trusts constituted inter vivos — Where respondent by deed declared one half of property held "upon trust" for second appellant — Whether respondent a trustee — Whether evidence extrinsic to deed relevant to intention to create trust.

Equity — Trusts and trustees — Powers, duties, rights and liabilities of trustees — Liability for breach of trust — Where trustee leased trust property — Whether duty to collect rent — Whether breach of duty to fail to collect unpaid rent — Where beneficiary knew trustee failed to collect rent and was told trustee had duty to collect rent — Whether beneficiary consented to or acquiesced in breach — Whether trustee entitled to set-off outgoings and improvements to property in taking of accounts.

Words and phrases — "acquiescence", "bare trust", "consent", "estoppel", "express trust", "intention", "upon trust".

Appealed from SA SC (FC): [2009] SASC 385; (2009) 3 ASTLR 459; (2009) 267 LSJS 43.

Local Government

Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd & Ors

S227/2010: [\[2011\] HCA 27](#).

Judgment delivered: 3 August 2011.

Coram: Gummow ACJ, Hayne, Heydon, Crennan and Bell JJ.

Catchwords:

Local government — Town planning — Proprietary rights — Suspension of proprietary rights by planning instrument — Ku-ring-gai Local Environment Plan No 194 ("LEP 194") amended Ku-ring-gai Planning Scheme Ordinance ("Ordinance") to effect rezoning of certain land — Purported effect of rezoning was to render unenforceable a restrictive covenant which burdened land owned by

third respondent for benefit of land owned by appellant — Section 28 of *Environmental Planning and Assessment Act 1979* (NSW) required that planning instrument which rendered unenforceable a restrictive covenant be approved by Governor acting on advice of Executive Council — Whether LEP 194 "provide[d] that" restrictive covenant "shall not apply" — Whether restrictive covenant unenforceable where failure to comply with s 28 when amending Ordinance.

Words and phrases — "environmental plan", "environmental planning instrument", "provide", "regulatory instrument".

Appealed from NSW SC (CA): [2010] NSWCA 214; (2010) 175 LGERA 433; [2011] ALMD 220.

2: CASES RESERVED

The following cases have been reserved or part heard by the High Court of Australia.

Administrative Law

Australian Crime Commission v Stoddart & Anor

B71/2010: [\[2011\] HCATrans 44](#).

Date heard: 1 March 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Administrative law — First respondent summoned under s 28 of *Australian Crime Commission Act 2002* (Cth) (“Act”) — First respondent declined to answer questions in relation to husband’s activities on basis of common law privilege against spousal incrimination — Whether distinct common law privilege against spousal incrimination exists — Whether privilege abrogated by s 30 of Act.

Appealed from FCA FC: (2010) 185 FCR 409; (2010) 271 ALR 53; [2010] FCAFC 89; [2010] ALMD 6989.

Arbitration

See Insurance: *Westport Insurance Corporation & Ors v Gordian Runoff Limited*

Constitutional Law

Williams v The Commonwealth

S307/2010: [\[2011\] HCATrans 198](#); [\[2011\] HCATrans 199](#); [\[2011\] HCATrans 200](#).

Dates heard: 9, 10 & 11 August 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law — Executive — Plaintiff the parent of children enrolled at Darling Heights State Primary School ("School") — Commonwealth implemented National School Chaplaincy Programme ("NSCP") in 2007 — Commonwealth entered into funding agreement with Scripture Union Queensland ("SUQ") for provision of funding to School under NSCP ("Funding Agreement") — From 2007, chaplaincy services provided to School by SUQ for reward using NSCP funding — Whether Funding Agreement invalid by reason of being beyond executive power of Commonwealth — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts in respect of matters other than those in respect of which the *Constitution* confers legislative power — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts in respect of which the *Constitution* confers legislative power — Whether executive power of Commonwealth includes power to enter into, and make payments pursuant to, contracts with respect to the provision of benefits to students within meaning of s 51(xxiiiA) of *Constitution* — Whether executive power of Commonwealth includes power to enter into contracts with trading corporations within meaning of s 51(xx) of *Constitution* — Whether payments to SUQ under Funding Agreement provide "benefits to students" — Whether SUQ a trading corporation — *Commonwealth Constitution*, ss 51(xx), 51(xxiiiA), 61.

Constitutional law — Revenue and appropriation — Payments under Funding Agreement drawn from Consolidated Revenue Fund ("CRF") by Appropriation Acts — Whether drawing of money from CRF for purpose of making payments under Funding Agreement authorised by Appropriation Acts — Whether Appropriation Acts authorised expenditure only for "ordinary annual services of government" — Whether permitted and appropriate to have regard to practices of Parliament to determine "ordinary annual services of the Government" — Whether payments to SUQ under Funding Agreement were "ordinary annual services of government" — *Commonwealth Constitution*, ss 54, 56, 81, 83.

Constitutional law — Restrictions on Commonwealth legislation — Laws relating to religion — Whether definition of "school chaplains" in NSCP Guidelines, as incorporated in Funding Agreement, invalid by reason of imposing religious test as qualification for office under the Commonwealth in contravention of s 116 of *Commonwealth Constitution*.

High Court of Australia — Original jurisdiction — Practice and procedure — Parties — Standing — Whether plaintiff has standing to challenge validity of Funding Agreement — Whether plaintiff has standing to challenge drawing of money from CRF for purpose of making payments pursuant to Funding Agreement — Whether plaintiff has standing to challenge Commonwealth payments to SUQ pursuant to Funding Agreement.

Words and phrases — "office under the Commonwealth", "ordinary annual services of the Government", "provision of benefits to students", "religious test", "school chaplains", "trading corporation".

This matter was filed in the original jurisdiction of the High Court.

Wotton v The State of Queensland & Anor

S314/2010: [\[2011\] HCATrans 191](#).

Date heard: 3 August 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law — Implied freedom of communication about government or political matters — Section 132(1)(a) of *Corrective Services Act 2006* (Q) ("Act") prohibits person from interviewing prisoners or obtaining written or recorded statements from prisoners, including persons on parole — Section 200(2) of Act allows parole board to impose conditions on grant of parole order — Plaintiff convicted of offence of rioting causing destruction and sentenced to imprisonment — Plaintiff granted parole subject to conditions prohibiting, inter alia, attendance at public meetings on Palm Island without prior approval of corrective services officer, and receipt of direct or indirect payments from the media ("Conditions") — Plaintiff sought approval to attend public meeting on Palm Island concerning youth crime and juvenile justice — Plaintiff's request denied by parole officer of second defendant, Central and Northern Queensland Regional Parole Board — Whether s 132(1)(a) of Act contrary to *Commonwealth Constitution* by impermissibly burdening implied freedom — Whether s 132(1)(a) of Act to be construed so as not to apply to a prisoner on parole — Whether s 200(2) of Act invalid to extent it authorises imposition of Conditions — Whether Conditions invalid as infringing implied freedom if s 200(2) of Act construed in conformity with implied freedom.

This matter was filed in the original jurisdiction of the High Court.

Queanbeyan City Council v ACTEW Corporation Ltd & Anor

C6/2010; C7/2010: [\[2011\] HCATrans 177](#).

Date heard: 21 June 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law — Duties of excise — Water abstraction charge ("WAC") imposed by Australian Capital Territory ("ACT") on respondent statutory corporation as condition of licence for taking of water — Respondent licensed to but not legally obliged to take water — WAC calculated by reference to quantum abstracted — From 1 July 2006, water fee incorporated into WAC — Whether WAC, as imposed from 1 July 2006, invalid because a duty of excise imposed contrary to s 90 of *Commonwealth Constitution* — Whether WAC a government financial arrangement and therefore not a tax — Whether WAC a charge for access to or purchase of a natural resource — Whether discernible relationship to value of acquisition necessary for governmental levy for access to and acquisition of natural resource to escape characterisation as a tax — If discernible relationship necessary, whether satisfied where government charges any rate borne by market, including monopoly rent — Whether discernible relationship between level of WAC imposed from 1 July 2006 and value of water acquired — Evidence required to establish absence of discernible relationship between charge and value of acquired resource — *Water Resources Act 1998* (ACT) — *Water Resources Act 2007* (ACT).

Constitutional law — Duties of excise — Utilities Network Facilities Tax ("UNFT") imposed on owners of network facilities, including water networks — UNFT calculated by reference to "route length" of network facility — Whether UNFT invalid because a duty of excise imposed contrary to s 90 of *Commonwealth Constitution* — Whether UNFT a government financial arrangement and therefore not a tax — Whether UNFT an impost on an essential step in production and distribution of water — Whether relationship exists between UNFT and quantity or value of water which passes through it — Whether material that UNFT incorporated into cost of water — Whether following factors sufficient to establish that UNFT not an excise: UNFT payable by owner, rather than operator, of network; UNFT imposed by reference to conferral of right to use and occupy land on which facility located; quantum of tax referable to length land occupied; quantum of UNFT not explicable only on basis of quantity and value of water supplied by respondent; payment of fee not a condition on transportation of water; UNFT does not select water network for discrimination so as to warrant conclusion that tax upon water carried in network — *Utilities (Network Facilities Tax) Act 2006* (ACT).

Practice and procedure — Precedents — Decisions of High Court of Australia ("HCA") — Binding effect on other courts — Whether intermediate appellate court may depart from dicta of justices of HCA, subsequently approved by other justices of HCA, where no decision of HCA has disagreed with those dicta.

Appealed from FCA FC: (2010) 188 FCR 541; (2010) 273 ALR 553; [2010] FCAFC 124.

Phonographic Performance Company of Australia Limited & Ors v The Commonwealth & Ors

S23/2010: [\[2011\] HCATrans 117](#); [\[2011\] HCATrans 118](#); [\[2011\] HCATrans 119](#).

Dates heard: 10, 11 & 12 May 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law — Operation and effect of *Commonwealth Constitution* — Copyrights, patents and trade marks — Powers with respect to property — Power to acquire property on just terms — Whether some or all of provisions in ss 109 and 152 of *Copyright Act 1968* (Cth) ("provisions") within legislative competence of Parliament by reason of s 51(xviii) of *Commonwealth Constitution* — Whether provisions beyond legislative competence of Parliament by reason of s 51(xxxi) of *Commonwealth Constitution* — Whether provisions should be read down or severed and, if so, how — Whether copyright in sound recordings under *Copyright Act 1912* (Cth) property — Whether provisions effected acquisition of property — Whether any acquisition of property on just terms within s 51(xxxi) of *Commonwealth Constitution*.

This matter was filed in the original jurisdiction of the High Court.

Roy Morgan Research Pty Ltd v Commissioner of Taxation

M177/2010: [\[2011\] HCATrans 78](#).

Date heard: 30 March 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law — Powers of Commonwealth Parliament — Taxation — Legislative scheme imposing obligation upon employers to pay superannuation guarantee charge — Whether charge a tax — Whether charge imposed for public purposes — *Luton v Lessels* (2002) 210 CLR 333; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 — *Commonwealth Constitution*, s 51(ii) — *Superannuation Guarantee Charge Act 1992* (Cth) — *Superannuation Guarantee (Administration) Act 1992* (Cth).

Appealed from FCA FC: (2010) 184 FCR 448; (2010) 268 ALR 232; [2010] FCAFC 52; (2010) 76 ATR 264; (2010) ATC 20-184.

Jemena Asset Management (3) Pty Ltd & Ors v Coinvest Limited
M127/2010: [\[2011\] HCATrans 45](#).

Date heard: 2 March 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Constitutional law — Operation and effect of *Commonwealth Constitution* — Inconsistency of laws under s 109 of *Commonwealth Constitution* — Commonwealth legislative scheme imposing obligation upon employers to pay for long service leave — State law imposing obligation upon employers in construction industry to contribute to fund for portable long service leave entitlements — Whether inconsistency between State and federal legislative schemes — *Construction Industry Long Service Leave Act 1997* (Vic).

Appealed from FCA FC: (2009) 180 FCR 576; (2009) 263 ALR 374; [2009] FCAFC 176; (2009) 191 IR 236; [2010] ALMD 2942.

See also **Criminal Law:** *Momcilovic v The Queen*

Contracts

Shoalhaven City Council v Firedam Civil Engineering Pty Limited
S216/2010: [\[2011\] HCATrans 11](#); [\[2011\] HCATrans 14](#).

Dates heard: 2 & 4 February 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Contracts — Building, engineering and related contracts — Settlement of disputes — Expert determination — Where express contractual obligation to give reasons in expert determination — Nature and extent of contractual obligation to give reasons — Whether expert determination contained inconsistency in reasons — Whether inconsistency in reasons means expert did not give reasons for determination as a whole — Whether inconsistency in reasons means contractual obligation not fulfilled and determination not binding on parties.

Appealed from NSW SC (CA): [2010] NSWCA 59.

Criminal Law

Moti v The Queen

B47/2010: [\[2011\] HCATrans 192](#); [\[2011\] HCATrans 194](#).

Dates heard: 3 & 4 August 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Criminal law — Procedure — Stay of proceedings — Abuse of process — Primary judge stayed indictment charging appellant with seven counts of engaging in sexual intercourse with person under age of 16 whilst outside Australia — Primary judge found financial support given to witnesses by Australian Federal Police an abuse of process — Whether open to conclude that appellant's prosecution, based on evidence of witnesses paid by Australian Executive in amounts alleged to exceed expenses of giving evidence and in response to alleged threats to withdraw from prosecution, an abuse of process — Whether stay of proceedings should be set aside.

Criminal law — Procedure — Stay of proceedings — Abuse of process — Appellant deported from Solomon Islands to Australia without extradition proceedings and allegedly with knowledge and "connivance or involvement" of Australian Executive — Appellant previously charged with similar offences in Vanuatu but discharged — Appellant contended removal from Solomon Islands a disguised extradition in breach of Solomon Islands' *Deportation Act* and Order of Magistrates' Court restraining authorities from effecting deportation — Whether principle in *R v Horseferry Magistrates' Court; Ex Parte Bennett (No 1)* [1994] 1 AC 42 allows an Australian court to grant stay of proceedings — Meaning of "connivance or involvement" — Whether Australian Executive involved itself or connived in unlawful rendition of appellant to Australia.

Words and phrases — "connivance", "involvement".

Appealed from Qld SC (CA): (2010) 240 FLR 218; [2010] QCA 178.

Muldrock v The Queen

S231/2010: [\[2011\] HCATrans 147](#).

Dates heard: 8 & 9 June 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Criminal law — Sentence — Appellant pleaded guilty to charge of sexual intercourse with child under age of 10 years — Further offence of aggravated indecent assault taken into account in sentencing — Appellant intellectually disabled — Appellant previously convicted of similar offence — Relevance of standard non-parole period in cases of less than mid-range seriousness — Relevance of rehabilitation and community protection to sentencing of intellectually disabled offenders — Whether appellant "significantly intellectually disabled" such that deterrence objective inappropriate — Whether full-time custody an exceptional penalty for intellectually disabled offenders — Whether appellant a person with "special circumstances" — *Crimes Act 1900* (NSW), ss 61M(1) and 66A — *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 3A, 54A and 54B.

Words and phrases — "significantly intellectually disabled", "special circumstances", "standard non-parole period".

Appealed from NSW SC (CCA): [2010] NSWCCA 106.

Commonwealth Director of Public Prosecutions v Poniatowska
A20/2010: [\[2011\] HCATrans 46](#).

Date heard: 3 March 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Kiefel and Bell JJ.

Catchwords:

Criminal law — Offences — Respondent failed to declare \$71,000 in commission payments while receiving parenting benefit from Centrelink — Whether omitting to perform act a physical element of offence — Whether existence of legal duty or obligation to perform act, imposed by offence provision or other Commonwealth statute, determinative of question about physical element — *Criminal Code 1995* (Cth), ss 4.3 and 135.2.

Words and phrases — "engages in conduct".

Appealed from SA SC (FC): (2010) SASR 578; (2010) 240 FLR 466; (2010) 271 FLR 610; [2010] SASCF 19; [2010] ALMD 7469.

Momcilovic v The Queen

M134/2010: [\[2011\] HCATrans 15](#); [\[2011\] HCATrans 16](#); [\[2011\] HCATrans 17](#); [\[2011\] HCATrans 145](#).

Dates heard: 8, 9 & 10 February 2011, 7 June 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Criminal law — Particular offences — Drug offences — Possession — Where person deemed to be in possession of drugs “upon any land or premises” occupied by person, unless person satisfies court to the contrary: *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (“Act”) s 5 — Whether s 5 of Act creates legal onus on accused to disprove possession on balance of probabilities or evidential onus of adducing or pointing to evidence capable of raising a reasonable doubt about possession.

Criminal law — Appeal — Grounds of appeal — Conduct of trial judge — Misdirection or non-direction — Where drugs found in appellant’s home — Where appellant and her partner gave evidence that drugs were her partner’s and that appellant had no knowledge of them — Whether trial judge should have directed jury that prosecution must prove appellant’s knowledge of drugs in order to prove possession.

Human rights — Presumption of innocence — Statutory reversal of burden of proof of possession of drugs — Where *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“Charter”) s 32 provides “[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights” — Whether s 5 of Act construed in light of s 37 of Charter is compatible with right to presumption of innocence — Charter ss 7(2), 25(1), 32(1).

Statutes — Acts of Parliament — Interpretation — Whether necessary to construe statutory provision without regard to s 32 of Charter to achieve “ordinary” construction of provision — Whether s 32 of Charter to be applied after a statutory provision is measured against s 7(2) of Charter — Whether s 32 of Charter a “cardinal principle” of statutory construction or a measure of last resort.

Constitutional law — Operation and effect of *Commonwealth Constitution* — Chapter III — Federal jurisdiction of State courts — Local limitations of State court — Whether s 32 of Charter confers a legislative function on State courts — Whether institutional integrity of State courts impaired — *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

Constitutional law — Operation and effect of *Commonwealth Constitution* — Inconsistency under s 109 of *Commonwealth Constitution* — Whether ss 5 and/or 71AC of Act inconsistent with ss 13.1, 13.2 and 302.4 of *Criminal Code* 1995 (Cth) ("Code").

Constitutional law — Operation and effect of *Commonwealth Constitution* — Inconsistency under s 109 of *Commonwealth Constitution* — Whether s 300.4 of Code evinces clear legislative intent not to cover the field — Whether Part 9.1 of Code intended to exclude or limit concurrent operation of cognate State or Territory laws — *Dickson v The Queen* (2010) 270 ALR 1.

High Court of Australia — Appellate jurisdiction — Where relief sought includes order setting aside declaration of inconsistent interpretation under s 36 of Charter made by intermediate appellate court — Whether High Court has jurisdiction under s 73 of *Commonwealth Constitution* to grant relief sought.

Appealed from Vic SC (CA): (2010) 265 ALR 751; [2010] VSCA 50; [2010] ALMD 4185.

Equity

HIH Claims Support Limited v Insurance Australia Limited
M147/2010: [\[2011\] HCATrans 144](#).

Date heard: 2 June 2011 — *Judgment reserved*.

Coram: Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ.

Catchwords:

Equity — Contribution — Equal and coordinate liability — Scaffolder Steele sub-contracted to Australian Grand Prix Corporation ("AGPC") — Steele held insurance policy with company in HIH group which, but for HIH collapse, responded to Steele's liability to AGPC — Appellant administrator of HIH Claim Support Scheme — AGPC held insurance policy with State Government Insurance Corporation ("SGIC") which extended to sub-contractors — SGIC's rights, liabilities and obligations vested in respondent — Whether appellant entitled to contribution from respondent — Whether liabilities of appellant and Steele and respondent and Steele equal and coordinate — Whether indemnities not coordinate because appellant may recover from liquidation of HIH — Whether equitable doctrine of contribution sufficiently flexible to do "practical justice" — Whether characterisation of separate contracts of insurance as "primary" and "secondary" prevents contribution — Whether relevant date for determining right to contribution is date of indemnity payment or date of casualty.

Words and phrases — "practical justice", "primary", "secondary".

Appealed from Vic SC (CA): [2010] VSCA 255; (2010) 16 ANZ Insurance Cases 61-863.

Evidence

Lithgow City Council v Jackson
S158/2010: [\[2011\] HCATrans 115](#).

Date heard: 5 May 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Crennan and Bell JJ.

Catchwords:

Evidence — Admissibility and relevance — Respondent found unconscious and injured in parklands during early hours of morning — Respondent had no memory of events leading to his injuries — Ambulance officers who attended scene recorded, inter alia, "? Fall from 1.5 metres onto concrete" ("Ambulance Record") — Whether Ambulance Record an opinion that respondent fell in to drain or record of fact that such a fall possible — If Ambulance Record a record of fact, whether it should have been excluded under s 136 of *Evidence Act 1995* (NSW) ("Act") — If Ambulance Record an opinion, whether it should have been excluded under s 76 of Act — Whether Ambulance Record a lay opinion and admissible under s 78 of Act — Whether opinion of underlying matter or event includes perceptions of aftermath of matter or event.

Words and phrases — "necessary".

Appealed from NSW SC (CA): [2010] NSWCA 136.

High Court of Australia

See **Constitutional Law:** *Williams v The Commonwealth*;
Criminal Law: *Momcilovic v The Queen*

Human Rights

See **Criminal Law:** *Momcilovic v The Queen*

Insurance

Westport Insurance Corporation & Ors v Gordian Runoff Limited
S219/2010: [\[2011\] HCATrans 12](#); [\[2011\] HCATrans 13](#).

Dates heard: 3 & 4 February 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Insurance — Reinsurance — Application of s 18B of *Insurance Act* 1902 (NSW) ("Act") to reinsurance contracts.

Arbitration — The award — Appeal or judicial review — Grounds for remitting or setting aside — Error of law — Where arbitrators found s 18B(1) of Act required appellant reinsurers to indemnify respondent reinsured in respect of certain claims made under insurance policy issued by respondent — Whether error of law to conclude that respondent's loss not caused by existence of relevant "circumstances" under s 18B(1) of Act — Whether s 18B(1) of Act applied to contracts — *Commercial Arbitration Act* 1984 (NSW), ss 38(5)(b)(i) and 38(5)(b)(ii).

Arbitration — The award — Appeal or judicial review — Grounds for remitting or setting aside — Whether arbitrators gave adequate reasons for making the award — *Commercial Arbitration Act* 1984 (NSW), s 29(1).

Appealed from NSW SC (CA): (2010) 267 ALR 74; (2010) 16 ANZ Insurance Cases 61-840; [2010] NSWCA 57.

Practice and Procedure

Michael Wilson & Partners Limited v Nicholls & Ors
S236/2010: [\[2011\] HCATrans 141](#); [\[2011\] HCATrans 142](#).

Dates heard: 31 May 2011, 1 June 2011 — *Judgment reserved*.

Coram: Gummow ACJ, Hayne, Heydon, Crennan and Bell JJ.

Catchwords:

Practice and procedure — Supreme Court procedure — Abuse of process — Appellant obtained judgment against respondents in Supreme Court of NSW ("NSWSC") for knowing participation in breach of fiduciary duty by a non-party — London arbitrators

subsequently issued interim award upholding breach of duties by non-party but denying compensation to appellant ("Award") — Respondents not party to Award — Whether abuse of process for appellant to seek to enforce judgment in NSWSC in face of Award.

Practice and procedure — Courts and judges — Disqualification of judges for interest or bias — Apprehended bias — Application of lay observer test in *Johnson v Johnson* (2000) 201 CLR 488 — Whether lay observer test "unnecessary" and "wholly artificial" where judge personally apprehends bias — Whether conclusion of NSW Court of Appeal on trial judge's apprehensible bias justified on facts.

Practice and procedure — Waiver — Trial judge refused to recuse himself ("recusal decision") and invited respondents to appeal recusal decision — Respondents did not appeal recusal decision until after trial and judgment adverse to respondents delivered — Whether recusal decision an order or judgment — Whether recusal decision amenable to appeal — Whether respondents waived right to appeal recusal decision by proceeding with trial.

Appealed from NSW SC (CA): (2010) 243 FLR 177; [2010] NSWCA 222.

See also **Constitutional Law:** *Queanbeyan City Council v ACTEW Corporation Ltd & Anor*

Restitution

Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Haxton; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Bassat; Equuscorp Pty Ltd (formerly Equus Financial Services Ltd) v Cunningham's Warehouse Sales Pty Ltd
M128/2010; M129/2010; M130/2010—M132/2010:
[\[2011\] HCATrans 50](#); [\[2011\] HCATrans 51](#).

Dates heard: 9 & 10 March 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ.

Catchwords:

Restitution — Restitution resulting from unenforceable, incomplete, illegal or void contracts — Recovery of money paid or property transferred — Respondents investors in tax driven blueberry farming schemes — Funds for farm management fees lent to investors by Rural Finance Ltd ("Rural") — Appellant lent money to Rural — Rural subsequently wound up — Loan contracts between

respondents and Rural assigned to applicant — Appellant's enforcement of contractual debts statute-barred — Where parties agreed in court below loan contracts illegal and unenforceable — Whether total failure of consideration — Whether respondents' retention of loan funds "unjust".

Restitution — Assignment of rights of restitution — Where Deed of Assignment assigning Rural's loans to appellant included assignment of "legal right to such debts ... and all legal and other remedies" — Whether rights of restitution able to be assigned — Whether rights of restitution assigned in this case.

Appealed from Vic SC (CA): (2010) 265 ALR 336; [2010] VSCA 1.

Statutes

AB v The State of Western Australia & Anor; AH v The State of Western Australia & Anor
P36/2010; P37/2010: [\[2011\] HCATrans 178](#).

Date heard: 23 June 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Hayne, Kiefel and Bell JJ.

Catchwords:

Statutes — Acts of Parliament — Interpretation — Gender reassignment — *Gender Reassignment Act 2000* (WA) ("Act") enables Gender Reassignment Board ("Board") to issue certificate recognising gender reassignment if, inter alia, the person "has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned": s 15(1)(b)(ii) — Applicants born female — Applicants gender dysphoric and diagnosed as having gender identity disorder — Applicants commenced and continue to undergo testosterone therapy, rendering each currently infertile — Applicants underwent bilateral mastectomies but not hysterectomies — Applicants have not undergone phalloplasty due to associated risks and unavailability of procedure in Australia — Board refused applicants' applications for certificates recognising reassignment of their gender from female to male — Whether Act remedial or beneficial legislation requiring liberal interpretation — Whether each applicant has, for purposes of s 3 of Act, "the physical characteristics by virtue of which a person is identified as male" — Whether determination regarding physical characteristics to be determined by reference to general community standards and expectations or from perspective of reasonable member of community informed of facts and circumstances, including remedial purpose of Act — Whether decision to issue gender reassignment certificate to be

made having regard solely to applicants' external physical characteristics or also by reference to applicants' internal physical characteristics — Whether female-to-male re-assignee with internal and external female genitals must undertake surgery to remove internal female genitals and construct external male genitals in order to have "the physical characteristics by virtue of which a person is identified as male" — Act, ss 3, 14, 15.

Words and phrases — "the physical characteristics by virtue of which a person is identified as male", "gender characteristics", "reassignment procedure".

Appealed from WA SC (CA): [2010] WASCA 172.

See also **Criminal Law:** *Momcilovic v The Queen*

Torts

Strong v Woolworths Limited t/as Big W & Anor
S268/2010: [\[2011\] HCATrans 194](#).

Date heard: 13 May 2011 — *Judgment reserved*.

Coram: French CJ, Gummow, Heydon, Crennan and Bell JJ.

Catchwords:

Torts — Negligence — Causation — Appellant slipped on chip and fell in area of shopping centre where respondent had exclusive right to conduct sidewalk sales — Whether causation established — Whether s 5D(1) of *Civil Liability Act 2002* (NSW) excludes consideration of material contribution to harm and increase in risk — Whether appellant demonstrated lack of adequate cleaning system responsible for debris on centre floor.

Words and phrases — "necessary condition".

Appealed from SC NSW (CA): [2010] NSWCA 282.

3: ORIGINAL JURISDICTION

The following cases are ready for hearing in the original jurisdiction of the High Court of Australia.

Administrative Law

Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor; Plaintiff M106/2011 by his Litigation Guardian, Plaintiff M70/2011 v Minister for Immigration and Citizenship & Anor M70/2011; M106/2011

Dates heard: *Proposed application for emergent interlocutory relief heard on 7 August 2011: [\[2011\] HCATrans 195](#). Application heard and interlocutory injunction granted on 8 August 2011: [\[2011\] HCATrans 196](#). Matters listed herein referred to an enlarged Court on 15 August 2011: [\[2011\] HCATrans 219](#).*

Catchwords:

Administrative law — Jurisdictional error — Procedural fairness — Detention and transfer to third country of "irregular maritime arrivals" — Arrangement between Governments of Australia and Malaysia for transfer and refugee status determination of up to 800 people from Australia to Malaysia executed on 25 July 2011 ("Arrangement") — First defendant ("Minister") declared Malaysia a "specified country" ("Declaration") pursuant to s 198A(3) of *Migration Act* 1958 (Cth) ("Migration Act") — Minister gave direction not to process asylum claims of "offshore entry persons" ("Direction") — Malaysia not party to certain international instruments — Domestic law of Malaysia does not recognise status of "refugee" or "asylum seeker" — Plaintiffs offshore entry persons brought to Christmas Island, an "excised offshore place" under Migration Act — Plaintiffs claim to have well-founded fear of persecution in country of nationality and sought protection from Australia — No assessment of protection obligations to plaintiffs undertaken — Plaintiffs fear they will be transferred to Malaysia — Whether s 198(2) of Migration Act authorises detention and removal of offshore entry persons for purpose of assessment in third country when no assessment of protection obligations undertaken — Whether s 198A of Migration Act the only source of power, or a limitation on s 198(2) power, to detain offshore entry persons whose claims have not been determined — Whether Declaration a valid and enforceable legislative instrument — Whether, by reason thereof, s 198(1) of Migration Act does not confer power to remove plaintiffs to Malaysia — Whether contents of Arrangement capable of providing basis for Declaration under s

198A(3)(i)-(iv) of Migration Act — Whether Minister must be satisfied as to matters in s 198A(3)(i)-(iv) to make a declaration — Whether criteria in s 198A(3)(i)-(iv) matters of jurisdictional fact — Whether, in making Declaration, Minister's satisfaction miscarried or formed otherwise than in accordance with law — Whether Declaration invalid — Whether power in s 198A(1) constrained by requirement to consider individual circumstances — Whether, by his Direction, Minister unlawfully fettered and constrained discretionary power in s 198A(1) — Whether Minister under duty to act in best interests of unaccompanied minors who are "non-citizen children" — Whether in best interests of children to whom Direction applies to be sent to Malaysia — Whether Direction requires repository of s 198A(1) power to contravene Minister's duty as guardian to act in best interests of non-citizen children — Whether Minister constructively failed to exercise jurisdiction under ss 46A and 195A of Migration Act — Migration Act, ss 4AA, 5, 46A, 189(3), 195A, 198, 198A, 486B — *Immigration (Guardianship of Children) Act 1946* (Cth), s 4AAA, 6.

Words and phrases — "asylum seeker", "excised offshore place", "irregular maritime arrivals", "offshore entry persons", "non-citizen child", "refugee".

This application for an order to show cause was filed in the original jurisdiction of the High Court.

Shahi v Minister for Immigration and Citizenship
M10/2011

Catchwords:

Administrative law — Jurisdictional error — Plaintiff born in Afghanistan — Plaintiff's precise age unknown — In May 2009, plaintiff arrived in Australia at Christmas Island without valid visa — Plaintiff applied for and granted Protection (Class XA) visa on, respectively, 14 and 16 September 2009 — On 4 December 2009, plaintiff's mother applied for Refugee and Humanitarian (Class XB) visa, subclass 202 (Global Special Humanitarian), as prescribed in Sch 1, item 1402 of Migration Regulations 1994 (Cth) ("Regulations") — Plaintiff's siblings and niece included as secondary applicants — Schedule 2 of Regulations lists criteria to be satisfied prior to grant of subclass 202 visa — Plaintiff the "proposer" of his mother's application — Plaintiff's mother "member of the immediate family" of plaintiff at 4 December 2009 for purpose of r 1.12AA of Regulations — On 7 September 2010, delegate of Defendant refused plaintiff's mother's application — Delegate gave as reasons for refusal the absence of compelling reasons "having regard to particular factors in the criteria" and, at time of decision, applicants were not members of plaintiff's immediate family because he was then aged over 18 — Plaintiff

under 18 years of age at time of his mother's application and over 18 years of age at date of refusal — Whether delegate made jurisdictional error in finding plaintiff's mother failed to meet requirements of cl 202.221 of Sch 2 to Regulations.

This matter was filed in the original jurisdiction of the High Court.

4: SPECIAL LEAVE GRANTED

The following cases have been granted special leave to appeal to the High Court of Australia.

Administrative Law

Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor
A7/2011: [\[2011\] HCATrans 149](#).

Date heard: *Referred to an enlarged Court on 8 June 2011 without oral submissions.*

Catchwords:

Administrative law — Judicial review — Grounds of review — Jurisdictional matters — Applicant notified two disputes in Industrial Relations Commission of South Australia ("Commission") — Commission at first instance and on appeal ruled it lacked jurisdiction to determine disputes — Section 206 of *Fair Work Act* 1994 (SA) ("Act") precludes review of Commission determinations unless "on the ground of an excess or want of jurisdiction" — Full Court of Supreme Court of South Australia ("Court") held it lacked jurisdiction to review Commission's determinations and dismissed summons for judicial review — Whether s 206 of Act precludes judicial review by Court of jurisdictional error not in "excess or want of jurisdiction" — Whether s 206 of Act beyond power of South Australian Parliament — Whether *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 impliedly overruled *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132.

Constitutional law — *Commonwealth Constitution*, Ch III — State Supreme Courts — Power of State Parliament to alter defining characteristic of Supreme Court of a State — Supervisory jurisdiction — Whether all jurisdictional errors of tribunals must be subject to review by the Supreme Court of a State — Whether s 206 of Act impermissibly limits Court's jurisdiction to exercise judicial review where jurisdictional error has occurred.

Industrial law — South Australia — Commission — Jurisdiction — Public servants — Disputes raised in Commission concerning "no forced redundancy" commitment, recreational leave loading and long service leave provisions in Enterprise Agreement — Whether Commission and Court erred in relation to jurisdiction.

Words and phrases — "on the ground of an excess or want of jurisdiction".

Appealed from SA SC (FC): (2011) SASR 223; [2011] SASCFC 14.

Constitutional Law

Handlen v The Queen; Paddison v The Queen
B5/2010; B7/2011: [\[2011\] HCATrans 120](#).

Date heard: 13 May 2011 — *Special leave granted*.

Catchwords:

Constitutional law — Trial by jury — Section 668E(1A) of *Criminal Code* (Q) ("proviso") allows court to dismiss appeal where points raised by appellant might be decided in appellant's favour if court considers no substantial miscarriage of justice has occurred — Applicants found guilty by jury of drug offences in contravention of *Criminal Code* (Cth) ("Code") — Court of Appeal found case put to jury "in terms alien to the forms of criminal responsibility" recognised by Code and applicants only criminally responsible as aiders under s 11.2 of Code — Court of Appeal applied proviso — Whether failure to put case against applicants to jury on correct basis of criminal liability a substantial miscarriage of justice — Whether s 80 of *Commonwealth Constitution* precluded application of proviso.

Criminal law — Appeal and new trial — Miscarriage of justice — Whether failure to put case against applicants to jury on correct basis of criminal liability a substantial miscarriage of justice — Whether s 80 of *Commonwealth Constitution* precluded application of proviso.

Words and phrases — "substantial miscarriage of justice".

Appealed from Qld SC (CA): (2010) 247 FLR 261; [2010] QCA 371.

Stoten v The Queen; Hargraves v The Queen
B72/2010; B73/2010: [\[2011\] HCATrans 120](#).

Date heard: 13 May 2010 — *Special leave granted on limited grounds*.

Catchwords:

Constitutional law — Trial by jury — Section 668E(1A) of *Criminal Code* (Q) ("proviso") allows court to dismiss appeal where points raised by appellant might be decided in appellant's favour if court

considers no substantial miscarriage of justice has occurred — Applicants found guilty by jury of conspiracy to defraud Commonwealth — Court of Appeal found errors in directions given to jury but applied proviso and dismissed appeal — Whether application of proviso inconsistent with s 80 of *Commonwealth Constitution* — *Weiss v The Queen* (2005) 224 CLR 300.

Criminal law — Appeal and new trial — Procedural fairness — Whether directions at trial constituted denial of procedural fairness — Whether Court of Appeal failed to take into account direction concerning applicants' interests in subject matter of evidence in applying proviso — *Weiss v The Queen* (2005) 224 CLR 300.

Words and phrases — "procedural fairness".

Appealed from Qld SC (CA): [2010] QCA 328.

Sportsbet Pty Ltd v The State of New South Wales & Ors
S290/2010; S291/2010: [\[2011\] HCATrans 52](#).

Date heard: 11 March 2011 — *Special leave granted on limited grounds*.

Catchwords:

Constitutional law — Freedom of interstate trade — Applicant a licensed bookmaker domiciled in Northern Territory — NSW legislative scheme prohibited use of race field information without approval and authorised imposition of fee as condition for approval ("Scheme") — Fee imposed on all wagering operators irrespective of whether domiciled in NSW — NSW racing control bodies subsidised NSW wagering operators — Whether practical effect of fee was to impose discriminatory burden of protectionist nature on interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — *Commonwealth Constitution*, ss 92 and 109 — *Northern Territory (Self Government) Act 1978* (Cth), s 49 — *Racing Administration Act 1998* (NSW), s 33(1).

Constitutional law — Freedom of interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — Whether practical effect of Scheme determinable without consideration of offsetting reductions in existing fees payable by intrastate traders — Whether necessary for interstate trader to show that interstate trader's competitive advantage derived from place of origin in another State or Territory and Scheme imposed discriminatory burden affecting that advantage — Whether Scheme protectionist if imposed with intention of protecting intrastate traders and fee not reasonably appropriate or adapted to non-protectionist objective — Whether validity of statutory prohibition, combined with administrative discretion to

relax prohibition, to be determined by comparing interstate and intrastate traders' positions — Whether relevant or determinative that State and administrative bodies intend discretion over prohibition to be exercised to protect intrastate traders — *Commonwealth Constitution*, ss 92 and 109 — *Northern Territory (Self Government) Act 1978* (Cth), s 49 — *Racing Administration Act 1998* (NSW), s 33(1).

Appealed from FCA FC: (2010) 189 FCR 448; (2010) 274 ALR 12; [2010] FCAFC 132.

Betfair Pty Limited v Racing New South Wales & Ors
S294/2010: [\[2011\] HCATrans 53](#).

Date heard: 11 March 2011 — *Special leave granted*.

Catchwords:

Constitutional law — Freedom of interstate trade — Applicant a licensed betting exchange domiciled in Tasmania — NSW legislative scheme prohibited use of race field information without approval and authorised imposition of fee as condition for approval ("Scheme") — Fee imposed on all wagering operators irrespective of whether domiciled in NSW — Where imposition of fee allegedly reduce applicant's commission by disproportionate amount compared to NSW operators — Whether practical effect of fee was to impose discriminatory burden of protectionist nature on interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — *Commonwealth Constitution*, s 92 — *Racing Administration Act 1998* (NSW), s 33(1).

Constitutional law — Freedom of interstate trade — Whether Scheme inconsistent with freedom of interstate trade, commerce and intercourse — Whether insufficient for interstate trader to show fees imposed greater business costs on interstate traders than intrastate traders — Whether necessary for interstate trader to show that interstate trader's competitive advantage derived from place of origin in another State or Territory and Scheme imposed discriminatory burden affecting that advantage — Whether Scheme protectionist if imposed with intention of protecting intrastate traders and fee not reasonably appropriate or adapted to non-protectionist objective — Whether validity of statutory prohibition, combined with administrative discretion to relax prohibition, to be determined by comparing interstate and intrastate traders' positions — Whether relevant or determinative that State and administrative bodies intend discretion over prohibition to be exercised to protect intrastate traders — *Commonwealth Constitution*, s 92 — *Racing Administration Act 1998* (NSW), s 33(1).

Appealed from FCA FC: (2010) 189 FCR 356; (2010) 273 ALR 664; [2010] FCAFC 133.

See also **Administrative Law:** *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor*

Contracts

ALH Group Property Holdings Pty Limited v Chief Commissioner of State Revenue

S128/2011: [\[2011\] HCATrans 215](#).

Date heard: 12 August 2011 — *Special leave granted on limited grounds.*

Catchwords:

Contracts — Discharge by agreement — Novation — Contract for sale of land ("Parkway Hotel") between Oakland Glen Pty Ltd ("Vendor") and Permanent Trustee Company Limited as trustee of ALE Direct Property Trust ("Purchaser") executed in 2003 ("2003 Contract") — Deed of Consent and Assignment between Vendor, Purchaser and applicant, executed in 2008, assigned rights and entitlements of Purchaser under 2003 Contract to applicant ("Deed") — Commissioner assessed Deed to ad valorem duty under s 22(2) of *Duties Act 1997* (NSW) ("Duties Act") as transfer of dutiable property — By Deed of Termination, Vendor and applicant rescinded Deed and 2003 Contract and entered new contract for sale of Parkway Hotel on which ad valorem duty paid — Applicant claimed Deed of Termination avoided liability of Deed for ad valorem duty and conferred right to refund under s 50 of Duties Act — Whether Deed effected novation of 2003 Contract — Whether Deed rescinded 2003 Contract and substituted for it a new contract for sale of Parkway Hotel between Vendor and applicant on terms of 2003 Contract as varied by Deed — Whether Deed a "hybrid tripartite contract" wherein Vendor's obligations flowed from assignment and applicant's obligations flowed from Deed — Duties Act ss 8(1)(a), 22(2), 50.

Words and phrases — "hybrid tripartite contract".

Appealed from NSW SC (CA): [2011] NSWCA 32.

Corporations

Australian Securities and Investments Commission v Shafron;
Australian Securities and Investments Commission v Terry;
Australian Securities and Investments Commission v Hellicar;
Australian Securities and Investments Commission v Brown;
Australian Securities and Investments Commission v Gillfillan;
Australian Securities and Investments Commission v Koffel;
Australian Securities and Investments Commission v O'Brien;
Australian Securities and Investments Commission v Willcox;
Shafron v Australian Securities and Investments Commission
 S29/2011; S30/2011; S31/2011; S32/2011; S33/2011;
 S34/2011; S35/2011; S36/2011; S37/2011: [\[2011\] HCATrans 128](#).

Date heard: 13 May 2011 — *Special leave granted*.

Catchwords:

Corporations — Management and administration — Evidence — Misleading announcement sent to Australian Stock Exchange ("ASX") — At trial, Australian Securities and Investments Commission ("ASIC") failed to call solicitor ("Mr Robb") advising James Hardie Industries Ltd ("JHIL") who attended meeting of Board of Directors — Trial judge made adverse findings and declarations of contravention against first to eighth respondents — Whether ASIC obliged to call particular witnesses pursuant to obligation of fairness — Whether ASIC failed to discharge burden of proving that JHIL Board passed Draft ASX Announcement resolution — Whether ASIC obliged to call Mr Robb to give evidence of firm's receipt of Draft ASX Announcement — Whether ASIC's failure to comply with obligations, if extant, had negative evidentiary impact on ASIC's case — Whether certain oral evidence of respondents Brown and Koffel ought to have been accepted as correlating with terms of Draft ASX Announcement — Whether ASIC failed to prove that JHIL Board passed resolution approving tabled ASX Announcement — Whether of evidentiary significance that company associated with respondent O'Brien produced to ASIC identical version of Draft ASX Announcement — Whether evidence of JHIL company secretary that practice of retaining versions of announcements approved for market release did not relate to period of release of misleading announcement — Whether reliability and weight to be attributed to Board minutes open to question — Whether declarations of contravention made in respect of first to eighth respondents should be set aside — Whether, in respect of Shafron cross-appeal: Shafron was an officer of JHIL who participated in decisions affecting the business of JHIL; Shafron's responsibilities as company secretary and general counsel fell within scope of duty of care and diligence imposed on him as an "officer" by s 180(1) of *Corporations Law* and *Corporations Act*

2001 (Cth) ("Acts"); Shafron's conduct was in his capacity as JHIL company secretary; Shafron breached s 180(1) of the Acts.

Appealed from NSW SC (CA): (2010) 274 ALR 205; (2010) 81 ACSR 285; [2010] NSWCA 331.

Criminal Law

Perini v The Queen & Anor

B17/2011: [\[2011\] HCATrans 201](#).

Date heard: 12 August 2011 — *Special leave granted. Appeal treated as heard instanter and allowed. Decision of Court of Appeal set aside and remitted to Court of Appeal.*

Catchwords:

Criminal law — Appeal and new trial — Applicant tried for manslaughter and other offences and sentenced to 13 years' imprisonment at first instance — Court of Appeal increased sentence to 18 years without finding error by sentencing judge or manifest inadequacy in sentence imposed at first instance — Subsequently, in *Lacey v Attorney-General for Queensland* [2011] HCA 10, High Court determined that Court of Appeal's approach in this matter incorrect — Whether Court of Appeal erred in law in allowing appeal against sentence in the absence of a finding of error or manifest inadequacy of sentence.

Appealed from Qld SC (CA): [2011] QCA 30.

PGA v The Queen

A3/2011: [\[2011\] HCATrans 148](#).

Date heard: *Special leave granted on 8 June 2011 without oral submissions.*

Catchwords:

Criminal law — Offences against the person — Sexual offences — Rape and sexual assault — Consent — Presumption of — Applicant charged in 2010 with rape, allegedly committed in 1963, against then wife — In 1963, s 48 of *Criminal Law Consolidation Act 1935* (SA) ("Act") made person convicted of rape guilty of felony — Where elements of offence of rape in 1963 supplied by common law — Where South Australian Parliament amended s 48 of Act in 1976 — Whether common law of Australia in 1963 permitted husband to be found guilty of rape of his wife — Whether irrebuttable presumption of consent to sexual intercourse between married

couples in 1963 — Effect of *R v L* (1991) 174 CLR 379 ("*R v L*") on common law in 1963 — Whether 1976 amendment to Act precludes subsequent amendment of common law position prevailing in 1963.

Criminal law — Appeal and new trial — Procedure — South Australia — Case stated and reservation of question of law — Whether common law of Australia in 1963 permitted husband to be found guilty of rape of his wife — Whether applicant can, as a matter of law, be convicted of counts of rape of his wife in 1963 — Act, s 350(2)(b).

Practice and procedure — Precedents — Development of common law — Prospective overruling — Whether common law recognises retrospective imposition of criminal liability absent statutory requirement — Whether change in common law effected by *R v L* to be applied retrospectively — Whether 1976 amendment to Act precludes subsequent amendment of common law position prevailing in 1963 — *Acts Interpretation Act 1915* (SA), s 16.

Appealed from SA SC (CCA): [2010] SASCF 81.

BBH v The Queen

B76/2010: [\[2011\] HCATrans 121](#).

Date heard: 13 May 2011 — *Referred to an enlarged Court*.

Catchwords:

Criminal law — Appeal and new trial — Evidence — Applicant found guilty by jury of maintaining indecent relationship with child under 16, indecent treatment of child under 16 and sodomy of a person under 18 — Complainant was applicant's daughter — Whether evidence of complainant's brother, who provided innocent explanation for an event held to be evidence of discreditable conduct, properly put before jury in circumstances where complainant gave no evidence about the event — Whether test for admissibility in *Pfennig v The Queen* (1995) 182 CLR 461 applies to evidence of discreditable conduct — If so, whether admissibility test applicable.

Appealed from Qld SC (CA): [2007] QCA 348.

See also **Constitutional Law:** *Handlen v The Queen*; *Paddison v The Queen*; *Stoten v The Queen*; *Hargraves v The Queen*

Industrial Law

See **Administrative Law:** *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor*

Intellectual Property

Roadshow Films Pty Ltd & Ors v iiNet Limited

S115/2011: [\[2011\] HCATrans 210](#).

Date heard: 12 August 2011 — *Special leave granted on limited grounds.*

Catchwords:

Intellectual property — Copyright — Infringement — Authorisation — Applicants owners and exclusive licensees of copyright in commercially-released motion pictures — Respondent an internet service provider whose agreements with customers contained terms requiring customers to comply with all laws and reasonable directions by respondent as well as obligation not to use service to infringe copyright — Respondent availed of legal and technical capacity to issue warnings to customers whose services being used to infringe copyright — Australian Federation Against Copyright Theft, on behalf of applicants, served copyright infringement notices on respondent, alleging users of respondent's network infringing copyright in cinematographic films by making them available online — Respondent took no action in response to notices — Whether respondent authorised infringements of applicants' copyright by users of respondent's internet services — Whether proper account taken of matters listed in s 101(1A) of *Copyright Act 1968* (Cth) — Whether respondent had sufficient knowledge of infringing acts to support finding of authorisation — Whether applicants required to present respondent with "unequivocal and cogent evidence" of infringing acts and undertaking to reimburse and indemnify respondent — Application of principles in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 — Whether respondent's conduct constituted "countenancing" of infringing acts.

Words and phrases — "authorise", "copyright", "countenance", "infringe", "unequivocal and cogent evidence".

Appealed from FCA FC: (2011) 275 ALR 1; (2011) 89 IPR 1; [2011] FCAFC 23.

Mortgages

Waller v Hargraves Secured Investments Limited
S285/2010: [\[2011\] HCATrans 153](#).

Date heard: 10 June 2011 — *Special leave granted*.

Catchwords:

Mortgages — Primary industry — Farm debt mediation — Mortgagee's remedies — Possession — Clause entitling mortgagee to possession upon default of mortgagor — *Farm Debt Mediation Act 1994* (NSW) ("Act") provides no enforcement action to be taken until creditor gives notice of availability of mediation ("Notice") and enforcement action taken by creditor other than in compliance with Act is void — Applicant mortgaged land in favour of respondent to secure all moneys owed under loan agreement — Applicant breached terms of loan agreement and respondent gave Notice — Parties subsequently executed further loan agreements which discharged previous debts and created new farm debts — Applicant defaulted in making interest payments due under third loan agreement — Respondent commenced proceedings for possession of property and judgment debt — Whether each pairing of mortgage and farm debt gave rise to separate farm mortgages — Whether further Notice required for enforcement action pursuant to third loan agreement — Whether there was a certificate "in respect of the farm mortgage concerned" within meaning of s 8(3) of Act — Whether certificate issued by Rural Assistance Authority under s 11 of Act void — Whether proceeding for possession and judgment debt should have been dismissed pursuant to s 6 of Act — Act, ss 6, 8 and 11.

Words and phrases — "enforcement action", "farm debt", "farm mortgage", "in respect of the farm mortgage concerned".

Appealed from SC NSW (CA): [2010] NSWCA 300.

Practice and Procedure

See **Constitutional Law:** *Queanbeyan City Council v ACTEW Corporation Ltd & Anor*, **Criminal Law:** *PGA v The Queen*

Statutes

Tasty Chicks Pty Ltd & Ors v Chief Commissioner of State Revenue

S39/2011: [\[2011\] HCATrans 151](#).

Date heard: 10 June 2011 — *Special leave granted on limited grounds.*

Catchwords:

Statutes — Acts of Parliament — Interpretation — Taxation and duties — Appeal and new trial — Powers of court — Substituted verdict or judgment — Section 97 of *Taxation Administration Act* 1996 (NSW) ("Act") allows taxpayer to apply to Supreme Court for review of decision of Chief Commissioner the subject of an objection — Section 97(4) of Act provides review by Supreme Court taken to be an appeal for purposes of *Supreme Court Act* 1970 (NSW) — Commissioner issued payroll tax assessments grouping first and second applicants with partnership and other companies — Commissioner disallowed applicants' objections — Applicants sought review by Supreme Court pursuant to s 97 of Act — Trial judge re-exercised discretion under de-grouping provisions and, contrary to Commissioner, held first and second applicants should be de-grouped — Court of Appeal held review under s 97 of Act an appeal in ordinary sense meaning Court not entitled to re-exercise discretion under de-grouping provisions and substitute its decision for that of Commissioner — Whether appeal instituted in Supreme Court pursuant to s 97 of Act an appeal by way of hearing de novo — Whether applicants required to prove that determination of Commissioner under review pursuant to s 97 of Act attended by error — Whether *Avon Downs v Pty Limited v FCT* (1949) 78 CLR 353 and *House v The King* (1926) 55 CLR 499 apply in proceedings under s 97 of Act in respect of Court's review of discretionary determination made by Commissioner — *Affinity Health Pty Limited v Chief Commissioner of State Revenue* (2005) 205 ATC 4637 — Act, ss 96 and 97 — *Supreme Court Act* 1970 (NSW), ss 19(2) and 75A.

Words and phrases — "appeal", "review".

Appealed from SC NSW (CA): [2011] NSWCA 326.

Australian Education Union v Department of Education and Children's Services

A12/2010: [\[2011\] HCATrans 22](#).

Date heard: 11 February 2011 — *Special leave granted.*

Catchwords:

Statutes — Acts of Parliament — Interpretation — Statutory powers and duties — Conferral and extent of power — General matters constrained by specific — Applicants teachers appointed under s 9(4) of *Education Act 1972* (SA) ("Act") — Where s 15 of Act enabled Minister to appoint teachers "officers of the teaching service" — Where s 9(4) of Act enabled Minister to appoint officers and employees "in addition to" officers of teaching service — Meaning of "in addition to" — Whether general power in s 9(4) constrained by specific power in s 15 — Whether within Minister's power to appoint teachers under s 9(4) of Act or whether s 15 sole source of Executive power.

Words and phrases — "in addition to".

Appealed from SA SC (FC): [2010] SASC 161.

Peter Nicholas Moloney t/a Moloney & Partners v Workers Compensation Tribunal

A22/2010: [\[2011\] HCATrans 25](#).

Date heard: 11 February 2011 — *Special leave granted*.

Catchwords:

Statutes — Subordinate legislation — Validity — Where s 88E(1)(f) of *Workers Rehabilitation Compensation Act 1986* (SA) ("Act") authorised President of Workers Compensation Tribunal to make Rules regulating "costs" — Where s 88G of Act regulated recovery of costs by worker's representative — Where r 31(2) of *Workers Compensation Tribunal Rules 2009* restricted recovery of costs by worker's representative — Whether "costs" in s 88E(1)(f) of Act includes solicitor-client costs or only party-party costs — Whether power conferred by s 88E(1)(f) limited by s 88G of Act — Whether s 88G invalidates r 31(2).

Appealed from SA SC (FC): (2010) 108 SASR 1; [2010] SASCFC 17.

Taxation and Duties

Federal Commissioner of Taxation v Bargwanna

S104/2011: [\[2011\] HCATrans 211](#).

Date heard: 12 August 2011 — *Special leave granted*.

Catchwords:

Taxation and duties — Income tax — Non-assessable income — Exempt entities — Funds established for public charitable purposes by instrument of trust — Section 50-105 of *Income Tax Assessment Act 1997* (Cth) ("ITAA") requires Commissioner to endorse entity as exempt from income tax in certain circumstances — Section 50-60 of ITAA provides that funds established in Australia for public charitable purposes by will or instrument of trust are not exempt from income tax unless, inter alia, "the fund is applied for the purposes for which it was established" — Respondents constituted by deed the Kalos Metron Charitable Trust ("Fund") for public charitable purposes — Fund administered by accountant and held in accountant's trust account — Interest from Fund applied to pay accountant's fees — Respondents obtained housing loan with provision of mortgage security — Loan arrangements involved Fund depositing \$210,000 into interest-offset account with lender — Respondents deposited other funds into account and withdrew funds in excess of deposits — Applicant refused Fund's application for endorsement under s 50-105 of ITAA — Whether application of part of Fund for purposes other than public charitable purposes meant criteria in s 50-60 of ITAA not satisfied — Whether misapplication of Fund moneys must be deliberate or intentional for conclusion that "is applied" criterion in s 50-60 not satisfied — Whether relevant inquiry is to application of Fund as a whole rather than individual transactions.

Words and phrases — "deliberate", "the fund is applied for the purposes for which it was established".

Appealed from FCA FC: [2010] FCAFC 126.

Torts

Amaca Pty Limited (Under NSW Administered Winding Up) v Booth & Anor; Amaba Pty Limited (Under NSW Administered Winding Up) v Booth & Anor

S6/2011; S7/2011: [\[2011\] HCATrans 152](#).

Date heard: 10 June 2011 — *Special leave granted on limited grounds.*

Catchwords:

Torts — Negligence — Causation — Dust diseases — Respondent ("Booth") suffers from mesothelioma contracted from asbestos inhalation in four domestic and employment periods — Third and fourth periods of exposure occurred while Booth worked with brake linings containing asbestos manufactured by applicants — Trial judge found each applicant responsible for 70 per cent of asbestos fibre to which Booth exposed in third and fourth periods — Evidence indicated incidence of mesothelioma increases in proportion to

increased exposure to asbestos — Whether causation in asbestos cases can be established by reference to increased risk of developing mesothelioma.

Torts — Negligence — Causation — Dust diseases — Evidence — Expert evidence — Experts for Booth gave evidence that all exposure to asbestos of the type found in applicants' brake linings, other than trivial or minimal exposure, materially contributed to Booth's mesothelioma — Whether sufficient evidence for conclusion that each exposure to asbestos a contributory cause of the development of mesothelioma.

Appealed from SC NSW (CA): [2010] NSWCA 344; [2010] Aust Torts Reports 82-079.

5: CASES NOT PROCEEDING OR VACATED

There are no cases in the High Court of Australia that are not proceeding or have been vacated since High Court Bulletin 05 [2011] HCAB 05.

6: SPECIAL LEAVE REFUSED

Canberra: 12 August 2011

(Heard in Canberra via video link to Brisbane and Melbourne)

Civil

Applicant	Respondent	Court appealed from	Result
McNab Constructions Australia Pty Ltd	Queensland Building Services Authority (B6/2011)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 380	Application refused with costs [2011] HCATrans 204
Paroz	Paroz & Ors (B2/2011)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 362	Application refused with costs [2011] HCATrans 205
Sapwell	Lusk & Ors (B21/2011)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 59	Application refused with costs [2011] HCATrans 206
Quinlivan	Australian Securities & Investments Commission (B3/2011)	Full Court of the Federal Court of Australia [2010] FCAFC 161	Application refused with costs [2011] HCATrans 208

Criminal

Applicant	Respondent	Court appealed from	Result
Heathcote	The Queen (B9/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 334	Application refused [2011] HCATrans 202
Heathcote	The Queen (B12/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 334	Application refused [2011] HCATrans 202
Rogers	The Queen (B14/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 334	Application refused [2011] HCATrans 202
Crothers	The Queen (B75/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 334	Application refused [2011] HCATrans 203
Melling	The Queen (B8/2010)	Supreme Court of Queensland (Court of Appeal) [2010] QCA 307	Application refused [2011] HCATrans 207
Saxby	The Queen (H2/2011)	Supreme Court of Tasmania (Court of Criminal Appeal) [2011] TASCCA 1	Application refused [2011] HCATrans 209

Sydney: 12 August 2011

Civil

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Deputy Commissioner of Taxation	Soong (S122/2011)	Supreme Court of New South Wales (Court of Appeal) [2011] NSWCA 26	Application refused with costs [2011] HCATrans 212
Ross & Ors	IceTV Pty Ltd (S236/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 272	Application refused with costs [2011] HCATrans 214
Firmstone & Anor	Estate Property Holdings Pty Ltd & Anor	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 315	Application refused with costs [2011] HCATrans 216
Sharples	Minister for Local Government & Ors (S311/2010)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 36	Application refused with costs [2011] HCATrans 217
Wilson	The State of New South Wales (S40/2011)	Supreme Court of New South Wales (Court of Appeal) [2010] NSWCA 333	Application refused with costs [2011] HCATrans 218

Criminal

<i>Applicant</i>	<i>Respondent</i>	<i>Court appealed from</i>	<i>Result</i>
Johnson	The Queen (S65/2011)	Supreme Court of New South Wales (Court of Criminal Appeal) [2010] NSWCCA 86	Application refused [2011] HCATrans 213